genuine coins of which those alleged to have been made are imitations: *United States* v. *Burns*, 5 McLean 23.

It is not error to instruct the jury that they may infer that gin is intoxicating, without any evidence of its properties or qualities: *Commonwealth* v. *Peckham*, 2 Gray 514. And the same is true of whiskey: *Egan* v. *State*, 53 Ind. 162. But not of malt liquors: *Shaw* v. *State*, 56 Ind. 188. But whether or not benzine is of a like nature with camphene or spirit gas, is not a matter of which the court can take judicial notice; it must be left to the jury: *Mears* v. *Insurance Co.*, 92 Penn. St. 15. But the court will notice the magnetic variation from the true meridian: *Bryan* v. *Beckley*, 6 Litt. (Ky.) 91. And so of the art of photography, the mechanical and chemical principles employed, the scientific principles on which they are based, and their results: *Luke* v. *Calhoun Co.*, 52 Ala. 115. And finally, the court will take judicial notice of the construction and uses of that useful instrument, the ice-cream freezer: *Brown* v. *Piper*, 91 U. S. 37

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Missouri.

STATE OF MISSOURI EX REL. BALTIMORE & OHIO TELEGRAPH CO. *v.* BELL TELEPHONE CO.

A., a Massachusetts corporation, and the owner of a patent on a telephone, licensed B., a Missouri corporation, to do the telephone business of St. Louis, upon condition that B. should not establish telephonic connection with any telegraph company unless specially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Company. Thereafter the Baltimore & Ohio Telegraph Company applied for a mandamus to compel B. to permit telephonic communication between it and the petitioner. A. was not made a party: *Held* (1), that A. was not a necessary party; (2) that all other telegraph companies were entitled to the same privilege granted the W. U. Co., upon paying the same price; and that the petitioner was entitled to the relief asked. TREAT, J., dissenting

APPLICATION for a mandamus.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.

BREWER, J., (Orally)—In this case, I regret to say that my brother TREAT and myself do not agree fully as to the rights of the parties. It is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri—the company having the telephone business of this city—to permit telephonic communication between it and the petitioner, the Baltimore & Ohio Telegraph Company. The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business, it may not establish telephonic connection with any telegraph company, other than that permitted by the licenser—the holder of the patent—the Massachusetts company; and it further appears that such licenser has permitted telephonic communication with the Western Union Telegraph Company.

Now the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual, or company, than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions; just as in the warehouse cases (*Munn* v. *State of Illinois*, decided by the Supreme Court of the United States, and reported in 94 U. S. 113), it was held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say, "You may charge so much, and no more, for

the transaction of this business." He puts his property into the channels of commerce—as multitudes are doing—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its legislature, or the power of the court enunciating general rules operative upon such transactions, to modify leases, modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the state of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So, my conclusion is that, notwithstanding the terms of this license, which seem to inhibit it from dealing with or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for mandamus will be sustained.

TREAT, J.—This is an application, it must be borne in mind, against the licensee, who has a license only in accordance with the terms thereof, and we are asked to mandamus that licensee to do what he has no authority to do under the terms of his license. I know of no power in a court which can change a contract between

the licenser and the licensee, and give him a contract other than what he has made, either by enlargement or diminution. If this application had been made against the American Bell Telephone Company, which holds the patent,—the patentee,—it would have been a very different question, and the views suggested by my brother judge would then come up for consideration. But how is it that this licensee, who has only a restricted privilege, can by a mandamus of this court be ordered to do what under his contracts he cannot do? Can we make a new contract? Now, so far as the American Bell Telephone Company is concerned, which holds the patent, it reserved for itself the right with respect to telegraphic connections; and it is alleged in this petition that it has granted that to one company. Now, if the American Bell Telephone Company was here, as between it and this party petitioner, the question presented by my brother judge would have arisen, and in that, possibly, we might not have differed at all.

This matter is not a new one in the courts. In the noted case in Ohio the court proceeded not as in this case, because there were two parties defendant or respondents, to wit: the American Bell Telephone Company, that had all these rights, with which it had not parted; also the local company, and the charter of the state in connection therewith. There is no such case here. A like case to this was reviewed very elaborately by the Connecticut Supreme Court (I think in 49 Conn.),[1] where precisely the views I am expressing were entertained, and they seemed to me a demonstration, and express much more clearly and forcibly than I can do in this summary manner, the true doctrine arising out of the sanctity of contracts. If this party wishes the American Bell Telephone Company to grant equal privileges to it with another telegraph company, let it pursue it—make it do what it is asked—but I cannot see, by any true theory of the law, why this local party is to have its rights enlarged, and its duties correspondingly enlarged, in violation of the contract under which it rests.

There may be many reasons, of course, no judicial notice of them being taken, why this restriction was made, to wit: Here is a telephonic system in St. Louis. Each one of you present here may wish, under the terms stated, to have such telephonic connection. It is stated in the license, which is a contract, that no one of you

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[1] *American Rapid Telegraph Co.* v. *Connecticut Telephone Co.*, 49 Conn. 352.

shall use that for the purposes of taking tolls thereon. In other words, if I have a telephonic connection in my house, and I pay whatever the figure is for it, I am not to open a general telephonic system there, and let the whole neighborhood come in and use my telephone, and pay me therefor, and thus destroy the telephone company's income. It is a personal right, restricted to the use of the individual and his immediate needs. When you bring a telegraph company into operation in connection with it, what would happen? At the telegraph stations here probably there are thousands of messages coming in every day. It is receiving for these telegrams a given amount of money, and taking its tolls thereon. Further than that, instead of doing as heretofore, employing its messengers to do this work, we are asked to compel this telephone company to do that messenger work for it, as an individual would do in permitting his telephone to be used 400 to 500 times a day—it may be for general purposes—and the whole telegraphic business of the country poured on this telephonic system and done at a low figure. That, I suppose, was one of the reasons why this restriction was put there.

But suffice it to say, in my judgment there is no authority for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there end his duties, obligations and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented. It cannot arise in this way.

Brewer, J.—I may be pardoned for suggesting, and I do it with great deference, because as you all know I share with all the members of the bar in this district in a profound admiration for my brother Treat, that there are two things which seem to me to make against his argument very strongly. I agree with him that if this telephonic system had refused a telephonic connection with any telegraph company, that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established a telephonic connection with one telegraph company, I think, every other telegraph company has equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer; and the further practical question, that while there may be a contract

between the licenser and the licensee, the licenser is not a citizen—an inhabitant—of or found within this district. Suppose this petitioner went to Massachusetts, and obtained a decree there binding the licenser; that would not bind the licensee; that would not disturb the contract, so far as the licensee is concerned. Would the court in Massachusetts have entertained a suit seeking to establish a naked legal right, and without practical benefit to any one? The licensee does not live in Massachusetts. The licenser does not live in St. Louis. Practically, of what avail would a decree be against a licenser in Massachusetts? Would it bind the licensee here? Haven't you got, in a last resort—a last analysis for practical results—to come right to the licenser, the holder, the proprietor of the telephonic system here?

Treat, J.—You omit one consideration (and I may say we are not going into a discussion of the question on the bench,) but it so happens that the licenser, by the very terms of his license, is the only party to make connection. He has done it, and the licensee has nothing to do with it. If you compel the licenser, in whom alone is reserved this privilege, to equalize the matter, he does it; it is immaterial whether the licensee agrees with whatever the licenser says shall be done. Hence the licensee wouldn't be a necessary party anywhere.

General Rule of Equality and Reasonableness.—The questions under discussion in the foregoing case have already been considered by some courts. In *Am. Union Tel. Co.* v. *Bell Telephone Co.*, 10 Cent. L. J. 438, the telegraph company applied to the telephone company for an instrument to be placed in its office. The telephone company refused, and a mandamus was asked and granted, compelling it to do so. Judge Thayer said: "The principles of law applicable to railroad companies and to other common carriers unquestionably apply to telegraph and telephone companies. Having established their lines and adopted a uniform mode of serving the public, consistent with their chartered powers, they must treat all persons similarly situated with respect to those lines alike, and without unjust discrimination. It is not for them to select whom they will serve, or impose conditions of service on one class of customers that do not apply equally to all persons occupying the same relative positions toward the company. * * * If it erects its main line along a certain street or streets, under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instruments to residents along such line for private use, and by making connections between such instruments and its main lines: above all, if it holds itself out to the public as prepared to furnish such instruments, and make such connections for all who may apply, then I should say that its duty to the public compels it to treat all residents along such

line, with absolute impartiality. It cannot grant such facilities or render such service to one citizen or corporation, and refuse like privileges to his next door neighbor. * * * It follows, from the principles above stated, that in refusing to grant to the relator, such facilities as it affords to other customers, it has violated an imperative duty imposed upon it by law." See also, 11 Cent. L. J. 359 (St. Louis Circuit Court).

The same point came before the Kentucky court sitting in chancery. Plaintiffs were proprietors of public carriages, and defendants were a telephone company that was also a proprietor of public carriages. The court said: "The real contention between plaintiffs and defendants is confined to their carriage services; the defendants insisting that against the plaintiffs, rivals in that business, they have a right to a monopoly in the use of their own telephonic methods of communicating and receiving orders for carriages; that a mere rival in one branch of their business, cannot force them to afford him the facilities which they have provided for another branch of their business. Upon the facts appearing upon the petition and affidavits of the plaintiffs, it is the opinion of the court that the defendants are engaged in two distinct employments—one operating a telephonic exchange, and the other operating a carriage service. They are not rivals in the former business, and as to that part of the defendant's business they occupy the same position towards the plaintiffs as they do towards the rest of the public. The defendants are a quasi public servant, and as such are bound to serve the general public, including the plaintiffs, on reasonable terms, with impartiality. They are governed by the principles of the law of common carriers. * * * The principles announced in an opinion by Judge THAYER, in *Am. Union Tel. Co.* v. *Bell Telephone Co.*, should determine this controversy:" *Louisville Transfer Co.* v. *Am. District Tel. Co.*, 24 Al. L. J. 283.

The Supreme Court of Nebraska has rendered a similar decision in *State* v. *Nebraska Telephone Co.*, 24 Am. L. Reg. 263. Respondent was the owner of, and conducted a system of public telephone exchanges in Nebraska and Iowa, including in its circuit abont 1500 telephone instruments, supplied by it to that number of subscribers, upon the terms fixed by itself. Relator applied to be admitted as a subscriber, and was refused. He tendered a full compliance with all the rules of the company. His place of business was accessible, no reason being shown why his request should not be granted. On an application for a mandamus, *held*, that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand must supply to all alike, without discrimination, and that having to supply the demand in the city of Lincoln, wherein the relator resided, and being fully able to furnish him with a telephone instrument, the same as its other subscribers, it was its duty to do so. And so also, has decided the Supreme Court of Ohio: *State* v. *Bell Telephone Co.*, 36 Ohio St. 296.

Similar conclusions have been reached by courts with reference to a board of trade, and its duty to its quotations of prices to the public without unjust discrimination. Thus in *Public Grain and Stock Exchange* v. *W. U. Tel. Co.*, 16 Fed. Rep. 289, TULEY, Chancellor, speaking of the exchange or board of trade said: "It may be true that neither the courts nor the legislature can interfere with its control of its own floor, or with the right of the board to discipline its members. But I am clearly of opinion that the business transacted upon the floor of the board of trade is 'affected with a public interest' to an extent which would authorize the legislature, and the courts in the absence of legislation, to prohibit

the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public. It is opposed to the very spirit of its charter that it become monopoly, or a corporation." But see *Bryant* v. *W. U. Tel. Co.*, 17 Fed. Rep. 825; *Bradley* v. *W. U. Tel. Co.*, Cincinnati Commercial Gazette, April 8th 1883; cited 17 Fed. Rep. 834.

So also with reference to gas companies. Perhaps the best case affirming the duty of a gas company to serve all alike is *Shepard* v. *Milwaukee Gas-Light Co.*, 6 Wis. 547. In this decision the duty is grounded upon the fact that a gas company is a practical monopoly, and as such, bound to serve alike all who are similarly situated, and who desire gas. It was even intimated in this last case, that dealers in groceries or other commodities, might be under a similar duty toward the public. "But suppose," said the court, "the citizen was prohibited from obtaining soap, candles, or carriages from any other than the particular corporation, how would the case stand? Could such company wantonly refuse to sell to the citizen upon the usual terms?" *Shepard* v. *Milwaukee G. L. Co.*, 6 Wis. 547. That a gas company must serve all who desire gas, see also, *N. O. G. L. & B. Co.* v. *Paulding*, 12 Rob. (La.) 378; *G. L. Co.* v. *Colliday*, 25 Md. 1: *People* v. *Manhatton G. Co.*, 45 Barb. 136; *Bedding* v. *Imperial G. Co.*, 7 Gas Jour. 418; *Penny* v. *Rossendale U. G. Co.*, 14 Id. 937.

The duty of railway, express, and telegraph companies to serve the public without unreasonable discrimination, either in prices or facilities, has been so often and so peremptorily affirmed by courts of the highest authority that as a principle, its acceptance is at least professed by most managers of those companies, however short of living up to its full meaning, they may come in the actual transaction of their business. As sustaining the application to these companies of the principle of reasonableness and equality, reference may however be made to the following decisions: *McDuffee* v. *Railroad Co.*, 52 N. H. 447: *N. E. Ex. Co.* v. *M. C. Rd. Co.*, 57 Me. 194; *Bennett* v. *Dutton*, 10 N. H. 481; *Sanford* v. *Railroad Co.*, 24 Penn. St. 378; *Munn* v. *Illinois*, 94 U. S. 113; *Winona, &c., Rd. Co.* v. *Blake*, Id. 180; *N. J. Nav. Co.* v. *Merchants' Bank*, 6 How. 382; *Vincent* v. *C. & A. Rd. Co.*, 49 Ill. 33; *C. & N. W. Rd. Co.* v. *People*, 56 Id. 365; *C. & A. Rd. Co.* v. *People*, 67 Id. 22; *People* v. *A. & V. Rd. Co.*, 24 N. Y. 269; *Southern Express Co.* v. *Iron Mountain Rd. Co.*, 3 McCrary 147; *Southern Ex. Co.* v. *Louisville & Nashville Rd. Co.*, 20 Am. L. R. (N. S.) 590; *State* v. *H. & N. H. Rd. Co.*, 29 Conn. 538.

The conclusions deduced by the writer from a study of the foregoing and other similar adjudications may be stated as follows: A corporation may by its charter or some statute, be made a public company. Public corporations must, because they are public, serve the public without unreasonable discrimination, either in prices or facilities.

While the fact that a public corporation is public, obligates it to deal equally by all, yet this fact is not the only reason, if indeed it be a reason at all, for imposing a similar duty upon boards of trade, telephone, railway, telegraph, gas, water, or other such companies. Ordinarily such companies are private, not public corporations, and their duties to the people result, not from their status as public or private corporations, but from the nature of the business they are engaged in.

That business, whether it consist in supplying transportation, communication, gas, water, quotations of prices or anything else, is serving the public, and when any one even a private person, undertakes to serve the public, he or it must render the service, whatever it may

be, impartially for all, and without undue preference or unjust prejudice towards any. It is the fact that the service is for the public, and not the legal status of the servant that determines the rule of law that governs its performance.

Especially will the rule of equality and reasonableness, be applied where the servant has a legal or practical monopoly of the services offered. It is probable that complaint of discrimination will arise only where a monopoly exists, for so long as there is competition, buyers unable to make satisfactory contracts with one dealer, may readily do so with another. But even where competition exists, it may be doubted whether a public dealer in any commodity may wantonly, unreasonably and injuriously prefer one customer to another.

CONFLICTING CASES.—While the weight of authority is believed by the writer to sustain these conclusions, it is not to be understood if the cases sustain them. Many courts decided differently. Thus with reference to gas companies, Judge BIGELOW says "No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their own option, whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on their business, is left to their own election. Nor is any power conferred upon them to take private property not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right and privilege given to them, is to dig up public streets and ways for the purpose of laying down their mains and pipes:" *Commonwealth* v. *Lowell G. L. Co.*, 12 Allen 75.

So, also, with reference to telephones; in *American Rapid Telegraph Co.* v. *Connecticut Telephone Co.*, 49 Conn. 352, wherein the Connecticut Telephone Company, organized as a joint-stock corporation under the general law of Connecticut for the purpose of constructing and using within the state mechanism for telephonic communication, purchased from the Bell Telephone Company, a Massachusetts corporation, which owned a patent for a telephone, a license for a term of years, to use its device within a certain district in Connecticut; the contract containing a provision, that no telegraph company, without the consent of the licensors, (who designated one company for the purpose), should be allowed through it, to collect and deliver messages from and to its customers. Another telegraph company which had a station in the district, having demanded of the Connecticut corporation the same benefit with the other company, with an offer of payment, and been refused, applied for a mandamus to compel the corporation to grant the benefit. *Held*, in refusing the application, that the Massachusetts corporation, owning the patent had a right in granting licenses for its use to impose whatever restrictions it chose; that the Connecticut corporation therefore acquired a right only to the restricted use of the patented device, and its duty to the public, did not extend beyond that restricted use; that the statute (Session Laws of 1879, ch. 36, amending Gen. Statutes, p. 342, sect. 8) requiring all telegraph and telephone companies to receive dispatches from all other telegraph and telephone lines, and transmit them on payment of the usual charge, could not operate to compel the Connecticut corporation to do what it had no right to do; that a Massachusetts statute to the same effect was to be regarded as applying to the action of the Massachusetts corporation as a carrier of speech in that state, and as not affecting its right to manufacture its instruments or sell or lease them in other states as the owner of the patent.

With reference to this case and the opinion of Judge TREAT in the principal case, this may be said: If the decisions that a telephone, telegraph, railway or other such company cannot discriminate in serving the public are sound, then the provision in the contract of the Bell Telephone Company with its licensees, that they shall furnish instruments only to such companies as may be designated by the licensors, is an unlawful stipulation. It is, therefore, no contract at all, so far at least as this provision is concerned. The licensees being governed in the distribution of their instruments by no provision whatever, or, what is the same thing in law, by a null and void provision, would be at liberty to furnish them to whomever they pleased, and of course indiscriminately. Such being their contract relation with their licensors, compelling them by mandamus to serve all the public alike, would not as suggested by Judge TREAT, be making a new contract for the parties. It would simply be enforcing their duties to the public in a matter not covered by any contract which the law could recognise.

Still, as has been already intimated, there is considerable conflict of authority concerning the public duties of these companies. See, with reference to boards of trade and their duty to furnish the public with quotations of prices, *Bryant* v. *W. U. Tel. Co.*, 17 Fed. Rep. 825. As to gas companies, see further *McCune* v. *Norwich City G. Co.*, 30 Conn. 521; *Commonwealth* v. *Gas L. Co.*, 12 Allen 75; *Paterson G. L. Co.* v. *Brady*, 27 N. J. L. 245; *Pudsey Coal G. Co.* v. *Corporation of Bradford*, L. R., 15 Eq. 167; *Houlgate* v. *Surrey Consumers G. Co.*, 8 Gas Jour. 261; *Hoddesdon G. & C. Co.* v. *Haselwood*, 6 C. B. (N. S.) 238; 8 Gas Jour. 261; *Com. Bank of Canada* v. *London G. Co.*, 20 U. C., Q. B. 233.

PRICE REGULATIONS.

1. *By the State or Municipality.*—It is the undoubted right of the legislature to regulate the price of whatever may be sold by a public servant to the people. A strong case upon this point is *Spring Valley Waterworks Co.* v. *Bartlett.* The Spring Valley Waterworks was organized under a statute providing that the price of the water furnished to San Francisco and its citizens should be fixed annually by two persons appointed by the city, two by the corporation, and one to be chosen by the other four, and in case they could not agree, by the sheriff of the county. Art. 14, of the California constitution, subsequently adopted, changed this mode without the consent of the company, and provided that the price of the water should be fixed annually by the board of supervisors of the city and county alone, giving the company no voice in the matter: *Held*, that such change was not void on the ground of taking private property for public or private use without compensation or without due process of law as conferring the sole power to fix the price upon the purchaser nor as impairing the obligation of a contract: *Held*, also that the fact that candidates for the office of supervisor pledged themselves to the people to fix prices, &c., in accordance with the requirements of the resolutions of a public meeting nominating them before election, did not disqualify the supervisors elected upon such pledges from acting in fixing the price of water: *Spring Valley Waterworks* v. *Bartlett* (California 1883, U. S. Circuit Court), 2 Am. & Eng. Corp. Cas. 94. See also *Spring Valley Waterworks* v. *Schottler*, 2 Am. & Eng. Corp. Cas. 122.

2. *By the Company.*—The company supplying the gas, water, communication, etc., may itself make reasonable charges therefor; *Parker* v. *Boston*, 1 Allen 361; *Cromwell* v. *Stephens*, 3 Ab. Pr. (N. S.) 26; *Allentown* v. *Henry*, 73 Penn. St. 404. But a city or water company cannot make unwarranted discriminations in particular cases or arbitrary charges with the penalty of forfeiture of the

right to use the water provided for the benefit of all the citizens, making a fair compensation for its use: *State* v. *Mayor, &c., of Jersey City*, 46 N. J. L. 297; *Dayton* v. *Quigley*, 2 Stew. Eq. 77; *Parker* v. *City of Boston*, 1 Allen 361; *Young* v. *City of Boston*, 104 Mass. 95; *Kip* v. *Paterson*, 2 Dutch. 298.

There are two ways in which water-rents may be rated and collected, one by meter, and the other by house-rates and estimates. A city or water company may adopt either, but it cannot put into a house an expensive meter—costing say $200—and compel the house owner or occupant to pay the price of it in addition to his regular water-bills, and it would appear from this case that water charges should be fixed primarily with a view to paying expenses of operating and maintaining the water system, and interest or dividends on the capital invested, together with the principal, if the water system be the property of the city; *State* v. *Mayor, &c., of Jersey City*, 46 N. J. L. 297. Water rents assessed on vacant lots at rates adopted by the board of works at its discretion and without regard to special benefits or valuations are illegal: *Jersey City* v. *Vreeland*, 14 Vroom 638; *Provident Ins. for Savings* v. *Allen*, 37 N. J. Eq. 36; *State* v. *Mayor*, 45 N. J. L. 256. And laches is not a bar, on certiorari to set aside such rents as having been assessed in an unconstitutional manner.

Water supplied for "domestic" use may be used without incurring liability for extra charge, for washing a horse and carriage, &c., in a coach-house and stable on the premises of the rate payer's residence: *Busby* v. *Chesterfield Co.*, E., B. & E. 176.

A building in New York was a large structure of eight stories, each story composed of lodging rooms adapted to the use of one person only. Above the basement it was used exclusively as a lodging house. The rooms were small, from four to six feet wide and eight feet long, and were let to lodgers at a fixed rate per night. There were no arrangements for boarding or cooking for guests, the place being adapted above the basement only for lodgings. Nor was there any bar or restaurant belonging to or connected with plaintiff's occupation of the building. *Held*, that this structure was not chargeable for water as a "hotel;" *Cromwell* v. *Stephens*, 3 Ab. Pr. (N. S.) 26.

A person occupying, with his family a suite of rooms in a building also occupied by other families, and having separate water attachments connected with a pipe which supplied the whole building, and on which pipe a meter was fixed, can by injunction, restrain the company from cutting off his supply, because he insists upon paying for the water used by himself, rather than have the owner of the building (also objecting) pay for the water used by all the tenants, and then attempt to subdivide the sum paid by the owner among the various tenants: *Young* v. *Boston*, 104 Mass. 95.

Security in the shape of a deposit of money or otherwise, may be required of a consumer, as a guaranty of the payment of his regular rates: *Shepard* v. *Milwaukee Gas Co.*, 6 Wis. 549. The company may demand an increase of the deposit where that given is insufficient to protect his large and increasing consumption bills: *Ford* v. *Brooklyn G. L. Co.*, 10 N. Y. Supreme Ct. 621. When the deposit is refunded to the consumer, the company may cut off the gas: *Littlewood* v. *Equitable Gas Co.*, 8 Gas J. 541. But see *Spratt* v. *South Met. Gas Co.*, 7 Gas J. 663 (1858), deciding that where the company's charter gave them no authority to demand a deposit, they had no right to require one as a condition to supplying gas, and in *Westlake* v. *St. Louis*, 77 Mo. 47, it was held that payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion, and if the charge is excessive, the excess may be

recovered without tendering the amount really due. The deposit demanded must however, be reasonable in amount; if it be unreasonable—*e. g.*, 2*l.* asked, where 1*l.* would have been sufficient—it may be compelled to furnish its gas or water on payment of the reasonable deposit: *Samuel* v. *Cordiff G. Co.*, 18 Gas J. 192.

In an action for damages for refusal to supply plaintiff with gas, it appeared that plaintiff made a deposit of 2*l.* 10*s.*, as requested, that at the end of the next quarter, a bill was rendered to him by the gas company, of 1*l.* 19*s.* 6*d.*; that in June following, the plaintiff was notified that unless he paid the bill at once, the gas would be cut off by the company; that he refused payment on the ground that the deposit more than covered the amount of the bill, and on June 18th the gas was cut off, and the company sent him a bill for 3*l.* 14*s.* 6*d.*, minus the deposit of 2*l.* 10*s.*; that the plaintiff was thereupon summoned before the magistrate, and compelled to pay 19*s.* 6*d.*, a charge of 5*s.* for cutting off the gas being disallowed, and that afterwards the plaintiff requested the company to resume the supply, which they refused to do, unless he paid the expense of putting it on again; *Held*, that the cutting off was illegal, and the company was liable for damages: *Halfhive* v. *Worthing Gas Co.*, 22 Gas J. 136.

In a suit for damages for the refusal of a gas company to supply him with gas, the court said there were "three grounds of defence alleged, viz.: 1st, That the plaintiff was a joint contributor and that this was a partnership debt; 2d, That on entering the premises he did not give notice to the defendants; 3d, That the company was not bound to furnish a supply of gas, but on all of these points the opinion was in favor of the plaintiff, and that a gas company had no right to deprive a tenant of his supply because of a disputed debt which he had expressed his willingness to pay if a court of law should decide he was liable:" *Penny* v. *Rosendale U. G. Co.*, 14 Gas J. 927.

Where the security taken by the company was a demand note signed by plaintiff, on which payment was immediately demanded and the gas shut off because plaintiff requested a short delay in payment: *Held*, that the security for the payment of the gas bills still existed, and that the refusal of the company to supply gas was not authorized by the statute: *Fowler* v. *Chartered Gas Co.*, 17 Gas J. 908.

Inability to pay, or non-payment of current bills for consumption, warrants the company in shutting off the water or gas: *People* v. *Manhattan G. L. Co.*, 45 Barb. 136; *Morey* v. *Metropolitan G. L. Co.*, 38 N. Y. Superior Ct. 185.

Furnishing an applicant for gas without objecting to his non-payment of bills, will not estop a company from refusing to supply him upon a subsequent application on the ground that his former bills are unpaid: *People* v. *Manhattan G. L. Co.*, 45 Barb. 136.

But the non-payment relied upon to justify the shutting off of water or gas must be that of the person whose water is shut off. Non-payment by his tenant, his landlord, or by some other person with whose liability he is in no way a privy, will not suffice. See *Dayton* v. *Quigley*, 29 N. J. Eq. 77.

A gas company cannot require the owner of a building to pay an amount due by a former owner for gas, as the condition of supplying him: *N. O. G. L. & B. Co.* v. *Paulding*, 12 Rob. (La.) 378; *Morey* v. *Metropolitan G. L. Co.*, 38 N. Y. Sup. Ct. 185. And a promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own benefit, and in consequence of a threat by the company having the exclusive privilege of vending gas that unless the amount be paid no gas would be furnished, is void: *N. O. G. L. & B. Co.*

v. *Paulding*, 12 Rob. (La.) 378. And where a company, having the right to cut off water from any consumer on failure to pay in advance, notified all of them that after March 1st the rates would be advanced from $10 to $12, and on March 1st P. tendered $10 for the ensuing year, which the company refused to receive, but allowed the water to run upon P.'s premises for the next two years: *Held*, that it could only recover $20, because it might have stopped the supply March 1st: *Aqueduct* v *Page*, 52 N. H. 472.

So where several contracts are made between the same parties, for different pieces of property, each requiring its own meter, a failure to comply with terms in relation to one, furnishes no excuse or ground to the company to withhold the gas from the other: *G. L. Co.* v. *Colliday*, 25 Md. 3.

Application.—A company may require its consumers to make a written application for a supply of gas, water, &c. But where a gas company has a right to insist that a customer shall make an application in writing for a supply of gas in a certain form but upon an oral application, refuses to supply him with gas, giving a different reason for such refusal, it thereby waives its right to such written application, and the fact that such application was oral, is no defence to an action for refusing to supply: *Shephard* v. *Milwaukee G. L. Co.*, 6 Wis. 539. The company may also require applicants to sign its reasonable regulations: *Shepard* v. *Milwaukee G. L. Co.*, 6 Wis. 546.

Inspection.—The company may reserve to itself the right to inspect meters, &c., at stated periods and with notice, but it cannot reserve the right to do so at all times and without notice: *Shepard* v. *Milwaukee G. L. Co.*, 6 Wis. 549.

Fraud on Company, Connecting Pipes, &c., Unreasonable Regulations.—A regulation that after the admission of gas into a person's fittings, they must not be disconnected or opened, either for alteration or repairs or extensions without a permit from the company, which may be obtained at their office free of expense; and that any gas-fitter or other person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby is illegal and void: *Shepard* v. *Milwaukee G. L. Co.*, 6 Wis. 549.

A gas company may reserve the right at any time to cut off communication of the service, if it be necessary so to do to protect the works against abuse or fraud, but cannot assume to itself the whole power to decide upon the question of abuse or fraud, either in fact o in anticipation, without notice, without trial, and of its own mere notion. It must resort to the same tribunals upon like process, for protection against fraud, as the law provides for individuals: *Shepard* v. *Mil. G. L. Co.*, 6 Wis. 549.

Supplying the Public with Water—Public use.—A town was presented with an ornamental fountain, provided with a trough or basin, which was set up in one of the public streets, and supplied with water on public market days *for the use of cattle in the market, and for horses if yolked when passing to and fro*: *Held*, that even if the fountain were a public nuisance, an inhabitant of the town would have no right to use it otherwise than as directed, for example, he would have no right in order to save the expense of water at his stables, to bring his horses to the basin to drink: *Hildreth* v. *Adamson*, 8 C. B. (N. S.) 587. All persons of the public must, however, be supplied equally. A supply cannot be given to one of a class, and denied to others,

In *Lumbard* v. *Stearns*, 4 Cush. 62, Chief Justice SHAW speaking of the suggestion made as to the charter of a water company that there being no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms, the company may act capriciously and oppressively; and that by furnishing some houses and lots and refusing

a supply to others, it may thus give a value to some lots and deny it to others, said: "This would be a plain abuse of their franchise. By accepting the act of incorporation they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or non-feasance, and the law has provided no other specific punishment for the breach, an indictment will lie. Perhaps also in a suitable case a process to revoke and annul the franchise might be maintained:" *Lumbard* v. *Stearns*, 4 Cush. 62. Failure to supply the public without unreasonable delay may make the company liable in damages, or to a penalty provided by statute: *Bedding* v. *Imperial Gaslight Co.*, 7 Gas J. 814; *Commercial Gas Co.* v. *Scott*, L. R., 10 Q. B. 400.

ADELBERT HAMILTON.

Supreme Court of South Carolina.

GRIFFITH, ADMINISTRATOR, *v.* THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

An administrator has no such property in the body of a decedent as will enable him to recover damages for its mutilation through the negligence of a railroad.

Semble: He may, however, recover damages in such case for the destruction of the apparel on such body.

APPEAL from Circuit Court.

The opinion of the court was delivered by

SIMPSON, C. J.—This action was brought by the plaintiff, appellant, as administrator of W. Scott Hook, deceased, to recover damages for the mutilation of the dead body of the intestate, and the destruction of the apparel in which it was clad, and of a silver watch at the time on the person of the deceased; all of which is alleged to have occurred by the gross negligence of the defendant company in running a train of cars over said dead body three several times. The defence denied negligence and claimed that the complaint did not state facts sufficient to constitute a cause of action. The whole issue was by consent referred to a special referee, to hear and determine the same.

The referee found as matter of law that the action by the administrator could be sustained. As matter of fact, that the mutilation of the dead body, and the destruction of the wearing apparel resulted from the careless and negligent action of the defendant, and that the amount of the recovery was not limited to the value of the clothing, $30, and he found for the plaintiff $10,000 damages.

The decision of the referee was reversed by his honor, Judge